

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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75-4058

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As

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNDERHILL CONSTRUCTION CORPORATION,

Petitioner,

against

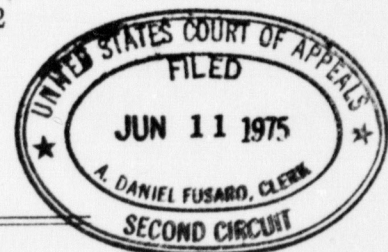
SECRETARY OF LABOR AND OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION

APPENDIX

SACKS, MONTGOMERY, MOLINEAUX &
PASTORE,
Attorneys for Petitioner
437 Madison Avenue
New York, New York 10022



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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of
UNDERHILL CONSTRUCTION CORPORATION
OSAHRC Docket No. 1307

7/18/72	Secretary's Citation for Serious Violation, dated
7/18/72	Secretary's Notification of Proposed Penalty, dated
8/8/72	Employer's Notice of Contest, dated
8/18/72	Secretary's Complaint, dated
9/12/72	Employer's Answer, dated
10/3/72	Commission's Notice of time, date and place of Hearing, dated
10/11/72	Employer's Motion for Special Orders for Deposition and Discovery, dated
10/25/72	Secretary's Opposition to Employer's Motion for Special Orders for Deposition and Discovery, dated
10/30/72	Administrative Law Judge's Order on Employer's Discovery Motion, dated
10/30/72	Secretary's Motion to Strike Employer's Affirmative Defense and Brief in Support of Motion, dated
11/2/72	Administrative Law Judge's Cancellation of Hearing date, dated
11/2/72	Employer's Brief in Opposition to Motion, dated
11/16/72	Administrative Law Judge's Ruling on Secretary's Motion to Strike Employer's Affirmative Defense, dated
11/17/72	Secretary's Letter in further Support of Motion to Strike Employer's Affirmative Defense, dated
11/20/72	Administrative Law Judge's Notice of time, date and location of Hearing, dated
11/29/72	Secretary's Motion for Postponement of Hearing and Renewal of Motion to Strike Employer's Affirmative Defense, dated
12/4/72	Administrative Law Judge's Cancellation of Hearing date and designation of new Hearing date, dated
12/4/72	Administrative Law Judge's Action on Motion, dated
12/13/72	Administrative Law Judge's Notice of time, date and location of Hearing, dated

Chronological List of Relevant Docket Entries

1/10/73	Hearing Opened
1/10/73	Hearing Closed
3/26/73	Employer's Brief, dated
4/9/73	Secretary's Memorandum of Law, dated
4/10/73	Employer's Response re: Secretary's Memorandum of Law, dated
5/23/73	Administrative Law Judge's Decision and Order, dated
6/14/73	Secretary's Petition for Discretionary Review, dated
6/19/73	Commissioner Van Namee's Direction for Review dated
6/21/73	Employer's Opposition to Secretary's Petition for Discretionary Review, dated
8/1/73	Secretary's Brief, dated
8/3/73	Employer's Memorandum of Law, dated
1/31/75	Commission's Decision, dated

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SECRETARY'S CITATION FOR SERIOUS VIOLATION DATED JULY 18, 1972 AND COVER LETTER

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

JUL 21 1972

U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
90 CHURCH STREET
NEW YORK, N.Y. 10007

CASH NO.	OSHA ID NO.
M-7789	130
AREA	REGION
4176	2

CITATION COVER LETTER

TO: Mr. Bob Henry
UNDERHILL CONSTRUCTION CO
212-02 41st Ave.
Bayside, New York

Date May 18, 1972

WCC

Subject: Citation for Alleged Occupational Safety and Health Violation(s)

An inspection of a workplace under your operation, ownership, or control has revealed conditions which we believe do not comply with the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651. The nature of such alleged violation(s) is described in the enclosed citation with references to applicable standards, rules, regulations, and provisions of the said Act. These conditions must be corrected on or before the date shown to the right of each violation therein.

The Act requires that a copy of the enclosed citation(s) be prominently posted "in a conspicuous place upon receipt" at or near each place a violation referred to in the citation occurred. It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer. A sufficient number of copies of the attached citation(s) should be prepared to permit posting in accordance with the requirements of the Act.

If you contest the citation you may post a notice to this effect near the citation contested. The Act contains penalties for violation of the posting requirements.

You will soon be notified by certified mail whether or not a proposed penalty will be assessed as a result of the cited violation(s). You have the right to contest the citation(s), the proposed penalties, or both, before the Occupational Safety and Health Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties. If you do contest, you must so notify the Area Director within 15 working days after receipt of the certified mail notice regarding proposed penalties. If you fail to contest within the 15 working day period, the citation and the proposed assessment of penalties shall be deemed to be a final order not subject to review by any court or agency.

An employee or representative of employees may file a notice to contest the time stated in the citation for the abatement of the alleged violation(s).

Alleged violations that are not contested shall be corrected within the abatement period specified in the citation. Failure to correct an alleged violation within the abatement period may result in a further proposed assessment of penalties.

As to alleged violations with an abatement period of 30 days or less, you are directed to promptly advise the Area Director as to the specific corrective action on each such violation and the date of such action.

Alleged violations having a longer abatement period will require a progress report at the end of each 30-day period. The progress report should detail what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, the Area Director shall be so advised.

A followup inspection may be made for the purpose of ascertaining that you have posted the citations as required by the Act and corrected the alleged violations as you have reported. The Act provides that whoever knowingly gives false information is subject to a fine up to \$10,000, imprisonment up to 6 months, or both.

If you wish additional information, you may direct such request to the undersigned at the address listed above.

U.S. Department of Labor

By Area Director

Nicholas DiArchangel

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Secretary's Citation for Serious Violation Dated July 18, 1972 and Cover Letter

U.S. DEPARTMENT OF LABOR Occupational Safety and Health Administration			
U.S. DEPARTMENT OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 200 CHURCH STREET NEW YORK, N.Y. 10007		OSHA NO. <div style="border: 1px solid black; padding: 2px; display: inline-block;">M7781</div>	OSHA-1 NO. <div style="border: 1px solid black; padding: 2px; display: inline-block;">130</div>
CITATION*		AREA <div style="border: 1px solid black; padding: 2px; display: inline-block;">4170</div>	REGION <div style="border: 1px solid black; padding: 2px; display: inline-block;">2</div>
Citation Number <u>1</u> Date Issued <u>July 18, 1972</u>			
EMPLOYER <u>Underhill Construction</u>			
(Street) <u>25th + F.D.R. Drive + 212-02 41 Ave Bayside</u>			
ADDRESS (City) <u>N.Y.C.</u> State <u>N.Y.</u> Zip _____			
An inspection of a workplace under your ownership, operation, or control located at <u>as above</u> and described as follows:			
has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:			
Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1	Construction 29 CFR Sect. 1926.300 (b)(2) p. 7366	Failure to provide belt and pulley guards on cutter and bending machines, yard area, as follows: "D I C" DU K-1, 2 Kardong Bros. + 1 Wisconsin.	8-28-72
2	1926.28 (a)	Failure to provide and require wearing protective goggles while burning with an acetylene torch. "C" bldg. 20th Fl.	immediately upon receipt of this notice
3	1926.450 (a) (10)	Failure to properly secure wood cleat ladders	7-31-72
4	1926.250 (a)	Failure to keep aisles and passage ways clear for free and safe movement of employees & equipment.	7-31-72
Area Director's Signature <u>[Signature]</u>			
<p>The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.</p> <p style="text-align: center;">RIGHTS OF EMPLOYEES</p> <p>Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.</p> <p>"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.</p> <p>The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.</p> <p>* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.</p>			

Secretary's Citation for Serious Violation
Dated July 18, 1972 and Cover Letter

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
90 CHURCH STREET
NEW YORK, N.Y. 10007

CSHO NO.	OSHA-1 NO.
M7781	130
AREA	REGION
4170	2

CITATION FOR SERIOUS VIOLATION*

Citation Number 1 Date Issued July 18, 1972
 EMPLOYER Underhill Construction
 Street 212-02 41st Ave
 ADDRESS (City Bayside State N.Y. Zip 11361)
 An inspection of a workplace under your ownership, operation, or control located at 25 St. & FDR Dr.
N.Y.C. and described as follows Concrete Contractors
 has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
Construction 29 CFR Sect. 1926.500 (d) (1) P. 7381	Failure to provide every open-sided floor 6 feet or more above ground level with a standard railing perimeter guarding or the equivalent as specified in paragraph f of this section C Bldg., 20 th Fl. on 6/15/72	must be immediately abated upon receipt of this notice

Area Director's Signature

[Handwritten Signature]

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near" each place a violation referred to in the citation occurred. It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

SECRETARY'S NOTIFICATION OF PROPOSED PENALTY DATED JULY 18, 1972

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

77781	130
AREA	RECORD
4170	2

OSHA-1

NOTIFICATION OF PROPOSED PENALTY

PAGE (1)

TO:

Cinderhill Construction Co.
212-02 41 Ave
Bayside N.Y.

On the _____ day of _____, 19____, a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (PL 91-1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below is/are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.

Proposed Penalty

1

700.00

OTHER VIOLATIONS*

Citation No.

Item No.

Proposed Penalty

1

1

70.00

1

2

35.00

1

3

none

1

4

70.00

Total for All Alleged Violations 875.00

* In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

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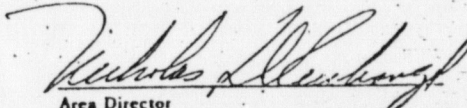
Secretary's Notification of Proposed Penalty
Dated July 18, 1972

The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed penalty shall be deemed to be the final order of the Occupational Safety and Health Review Commission. This order is subject to review by any court or agency, unless, within 15 working days from the date of receipt of this Notification, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial body with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at 90 Church St., NYC NY this 18 day
of July, 19 72


Area Director
Occupational Safety and Health Administration
U. S. Department of Labor

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SECRETARY'S COMPLAINT DATED AUGUST 18, 1972

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

v.

UNDERHILL CONSTRUCTION CORPORATION,

Respondent

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NOS. 14 and 15; METALLIC LATHERS UNION,
LOCAL NO. 46; CEMENT AND CONCRETE WORKERS
UNION, LOCAL NO. 20; CEMENT AND CONCRETE
WORKERS UNION, LOCAL NO. 6A; CEMENT AND
CONCRETE WORKERS UNION, LOCAL NO. 18A; UNITED
CEMENT MASONS UNION OF GREATER NEW YORK AND
LONG ISLAND, LOCAL NO. 780; AND CARPENTERS
LOCAL UNION, LOCAL NO. 257,

Authorized
Employee
Representatives.

OSHRC DOCKET

NO.

COMPLAINT

RICHARD F. SCHUBERT
Solicitor of Labor

FRANCIS V. LA RUFFA
Regional Solicitor

SAMUEL GORIN
Deputy Regional Solicitor

U. S. DEPARTMENT OF LABOR
Attorneys for
JAMES D. HODGSON,
SECRETARY OF LABOR.

POST OFFICE ADDRESS:

Francis V. LaRuffa,
Regional Solicitor
U. S. Dept. of Labor
1515 Broadway, Room 3555
New York, New York 10036
Tel. 212-971-7571

Secretary's Complaint Dated August 18, 1972

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

v.

UNDERHILL CONSTRUCTION CORPORATION,

Respondent

OSHRC DOCKET

NO.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NOS. 14 and 15; METALLIC LATHERS UNION,
LOCAL NO. 46; CEMENT AND CONCRETE WORKERS
UNION, LOCAL NO. 20; CEMENT AND CONCRETE
WORKERS UNION, LOCAL NO. 6A; CEMENT AND
CONCRETE WORKERS UNION, LOCAL NO. 18A; UNITED
CEMENT MASONS UNION OF GREATER NEW YORK AND
LONG ISLAND, LOCAL NO. 780; AND CARPENTER'S
LOCAL UNION, LOCAL NO. 257,

Authorized
Employee
Representatives.

COMPLAINT

Inspection has disclosed that, at the time and in the manner hereinafter stated, the provisions of section 5(a)(2) of the Occupational Safety and Health Act of 1970 (84 Stat. 1604; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act, and the Occupational Safety and Health Standards promulgated thereunder (29 C.F.R. Part 1926 formerly designated as 29 C.F.R. Part 1518) have been violated. These safety regulations referred to in the above

Secretary's Complaint Dated August 18, 1972

paragraph were adopted as standards under the Occupational Safety and Health Act at 29 C.F.R. Part 1910.12. It is, therefore, averred and charged that:

I

The respondent, UNDERHILL CONSTRUCTION CORPORATION, a corporation doing business in the State of New York and maintaining an office and place of business at 212-02 41st Avenue, Bayside, New York, is and at all times hereinafter mentioned was engaged in the business of construction, including the construction of forms, placing of reinforcement rods, the pouring of concrete and other related activities.

II

The respondent was engaged in the above mentioned activities on and about June 14, 1972 at the Waterside Apartments, under construction at 25th Street and the F.D.R. Drive, New York, New York. Many of the materials, equipment and supplies used by respondent corporation were manufactured outside the State of New York. The respondent corporation was and is, therefore, engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

III

As a result of an inspection at the job site described in the preceding paragraph on and about June 14, 1972, by an authorized representative of the plaintiff, respondent corporation was issued one citation for a serious violation on July 18, 1972, pursuant to section 9(a) of the Act.

IV

On or about June 15, 1972, at the job site described in paragraph II, the respondent corporation violated the standard found in 29 C.F.R. 1926.500(d)(1) in that the respondent corporation failed to guard open-sided floors, six feet or more above the adjacent floor or ground level, by standard railings or the equivalent thereof in building "C" on the twentieth floor.

V

The violation alleged in the citation for serious violation and reflected in paragraph IV of this complaint was a serious violation within the meaning of section 17(h) of the Act in that there was a substantial probability that death or serious physical harm could result from the conditions alleged to exist and respondent corporation knew, or with the exercise of reasonable diligence, could have known of the presence of the violations.

VI

As a result of an inspection by an authorized representative of the plaintiff, respondent corporation was issued a citation for violations other than serious on July 18, 1972 pursuant to section 9(a) of the Act.

VII

On or about June 14, 1972 at the job site described in paragraph II, the respondent corporation violated the standard found in 29 C.F.R. 1926.300(b)(2) in that respondent corporation failed to provide belt and pulley guards on cutter and bending machines identified as "DIC DUK-1", Two Kardong Eros. and One Wisconsin located in the yard area.

VIII

On or about June 15, 1972 at the job site described in paragraph II, the respondent corporation violated the standard found in 29 C.F.R. 1926.28(a) in that the respondent corporation failed to require the wearing of appropriate personal protective equipment where there was exposure to a hazardous condition and a need to use such equipment to reduce the hazards; viz., failed to require use of protective goggles to employees burning with an acetelyne torch in building "C" on the twentieth floor.

IX

On or about June 14, 1972 at the job site described in paragraph II, the respondent corporation violated the standard found in 29 C.F.R. 1926.450(a)(10) in that respondent corporation failed to properly secure portable wood cleat ladders to prevent their displacement.

X

On or about June 14, 1972 at the job site described in paragraph II, the respondent corporation violated the standard found in 29 C.F.R. 1926.250(a)(3) incorrectly stated in the citation as 29 C.F.R. 1926.250(a), in that the respondent corporation failed to keep aisles and passageways clear to provide safe and free movement of equipment or employees.

XI

The violations alleged in the citation and reflected in paragraphs VII through X of this complaint were violations within the meaning of section 17(c) of the Act and had a direct and immediate relationship to safety and health.

XII

On July 18, 1972, a notification of proposed penalty for the citations reflected herein was mailed to the respondent corporation proposing a penalty of \$700 for the citation for serious violation and a total of \$175 for the other violations. In determining the amount of the proposed penalties, due consideration was given to the size of the business of the respondent corporation,

Secretary's Complaint Dated August 18, 1972

the gravity of the violations, the good faith of the employer and the history of previous violations, as required under section 17(j) of the Act. The citations fixed an immediate abatement date for the serious violation described in paragraph IV and the violation described in paragraph VIII. The citations fixed abatement dates of August 28, 1972 for the violation described in paragraph VII and July 31, 1972 for the violations described in paragraphs IX and X. All abatement dates were reasonable.

XIII

To the extent that this complaint may be inconsistent with the citations and proposed penalties issued in this proceeding, the citations and proposed penalties are deemed to be amended accordingly.

XIV

On August 11, 1972, the respondent corporation filed with a representative of the Secretary of Labor a notification of intent to contest the citation for a serious violation and the proposed penalty thereon, pursuant to the provisions of section 10(c) of the Act. The said notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission and jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

Secretary's Complaint Dated August 18, 1972

There are employees of the respondent corporation affected by the violations reflected herein. These affected employees are represented by the International Union of Operating Engineers, Local Nos. 14 and 15, having a local chapter representing several of the employees herein involved at 336 East 13th Street, New York, New York; the Metallic Lathers Union, Local No. 46, having a local chapter representing several of the employees herein involved at 1332 Third Avenue, New York, New York; the Cement and Concrete Workers Union, Local Nos. 20, 6A and 16A, having local chapters representing several of the employees herein involved at 207 East 84th Street, New York, New York, 10 East 13th Street, New York, New York and 321 East 73rd Street, New York, New York, respectively; the United Cement Masons Union of Greater New York and Long Island, Local No. 780, having a local chapter representing several of the employees herein involved at 178 East 85th Street, New York, New York; and the Carpenter's Local Union, Local No. 257, having a local chapter representing several of the employees herein involved at 157 East 25th Street, New York, New York. The said local unions are certified as collective bargaining representatives of the respondent's employees and at all times relevant herein have had collective bargaining agreements with respondent corporation.

Secretary's Complaint Dated August 18, 1972

WHEREFORE, the aforesaid citations and proposed penalties should be affirmed.

/s/ Richard. F. Schubert

RICHARD F. SCHUBERT
Solicitor of Labor

/s/ Francis V. LaRuffa

FRANCIS V. LA RUFFA
Regional Solicitor

/s/ Samuel Corin

SAMUEL CORIN
Deputy Regional Solicitor

U. S. DEPARTMENT OF LABOR
Attorneys for JAMES D. HODGSON,
SECRETARY OF LABOR.

NOTICE PURSUANT TO
RULE 2200.5(a)

In all proceedings brought pursuant to sections 10(a), 10(b) or 10(c) of the Act, the Secretary, the employer to whom the citation, notice of proposed penalty or notice of failure to abate has been issued, and the affected employees or authorized employee representatives shall be deemed parties. An affected employee (or group of affected employees), who is not represented by an authorized employee representative, as contemplated by section 8(c) of the Act, who has been duly served and notified in accordance with sections 2200.7(i) and 2200.31, and who fails to identify himself as a party by appropriate notice to the Judge or the Commission prior to or at the commencement of the hearing shall, except upon order of the Judge or the Commission, be estopped from asserting his party status. All pleadings served by posting in accordance with section 2200.7(i)(1), and all notice of hearings shall specifically advise such unrepresented employees of the estopped provisions of this section. All other affected employees who have an authorized representative, as defined in section 2200.1(f) shall be represented in proceedings before the Commission or its Judges only by such representative.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC
DOCKET
No. 1307

1. Respondent admits the allegation stated and contained in paragraph "I" of the Complaint.

Employer's Answer Dated September 12, 1972

2. Respondent admits that it was engaged in construction activities on or about June 14, 1972, at the Waterside Development under construction at 25th Street and East 30th Street, Borough of Manhattan, City and State of New York, and that many of the materials, equipment and supplies used by Respondent were manufactured outside the State of New York.

All allegations stated and contained in paragraph "II" of the Complaint or in any other paragraph of the Complaint that the Occupational Safety and Health Act of 1970 and the Occupational Safety and Health Standards promulgated thereunder are applicable to the work performed by Respondent on the aforesaid project are denied by Respondent.

It is further denied that Respondent was engaged in a business affecting commerce within the meaning of Section 3(5) of the Act.

3. Respondent admits that it was issued one citation for a serious violation on July 18, 1972. Except as hereinbefore specifically admitted, Respondent denies knowledge or information sufficient to form a belief as to the allegations stated and contained in paragraph "III" of the Complaint.

Employer's Answer Dated September 12, 1972

4. Respondent denies the allegations stated and contained in the paragraphs "IV" and "V" of the Complaint.

All allegations stated and contained in paragraphs "IV" and "V" of the Complaint or in any other paragraph of the Complaint that the standard found in 29 C.F.R. 1926.500(d)(1) is applicable to the work performed on the aforesaid project by Respondent or was violated by Respondent are denied.

5. Respondent admits it was issued a citation for violations other than serious on July 18, 1972, pursuant to Section 9(a) of the Act. Except hereinbefore specifically admitted, Respondent denies knowledge or information sufficient to form a belief as to the allegations stated and contained in paragraph "VI" of the Complaint.

6. Respondent neither admits nor denies the allegations stated and contained in the paragraphs "VII", "VIII", "IX", "X" and "XI" of the Complaint.

7. Respondent admits that on July 18, 1972, a notification of proposed penalty for the aforesaid serious violation was mailed to the Respondent proposing a penalty of \$700.00 and fixed an immediate abatement date with respect to said alleged violation. Respondent

Employer's Answer Dated September 12, 1972

neither admits nor denies the allegations stated and contained in paragraph "XII" of the Complaint concerning other citations. Except as specifically admitted or otherwise stated above, Respondent denies knowledge or information sufficient to form a belief as to the allegations stated and contained in paragraph "XII" of the Complaint.

8. Respondent neither admits nor denies the allegations stated and contained in paragraph "XIII" of the Complaint.

9. Respondent admits the allegations stated and contained in paragraph "XIV" of the Complaint.

10. Respondent admits the allegations stated and contained in paragraph "XV" of the Complaint.

AS AND FOR ITS FIRST SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

11. 29 C.F.R. 1926.1050, one of the regulations promulgated under 29 U.S.C. 651, et seq. provides as follows:

"Effective Dates (general)

Except where different effective dates are specifically provided in Section 1926.1051 the safety and health standard published in Subparts C through U of this part shall become effective on April 24, 1971 for all Federal and federally

Employer's Answer Dated September 12, 1972

assisted advertised contracts subject thereto which are advertised after that date and on April 27, 1971 for all such negotiated contracts for which negotiations begin after that date."

12. Respondent made and entered into a sub-contract dated October 1, 1970 with HRH Construction Corp., as prime contractor, entered into a contract dated December 30, 1970, for the Waterside Development in the Borough of Manhattan, City and State of New York with Waterside Redevelopment Co. Inc. as owner.

13. On information and belief said development received federal assistance.

14. Respondent entered into a subcontract with HRH Construction Corp. dated October 1, 1970 to furnish certain materials and to perform certain work for the said Waterside Development.

15. The citation issued for a serious violation of the standard specified in 29 C.F.R. 1926.500(d)(1) as alleged in the Complaint was issued with respect to work performed by Respondent under the aforesaid subcontract with HRH Construction Corp.

16. By reason of 29 C.F.R. 1926.1050, the standard specified in 29 C.F.R. 1926.500(d)(1) is not applicable to the work performed by Respondent at the Waterside Development, the Citation for Serious Violation

Employer's Answer Dated September 12, 1972

issued thereunder was improperly issued and the proposed penalty was improperly assessed.

WHEREFORE, the Complaint is without merit and should be denied and the Citation for Serious Violation and proposed penalty dismissed.

NORTON, SACKS, MOLINEAUX & PASTORE

By: 

A Partner

Attorneys for Respondent
UNDERHILL CONSTRUCTION CORPORATION
Office & P.O. Address
230 Park Avenue
New York, New York 10017
(212) 689-5460

A 24

SECRETARY'S MOTION TO STRIKE EMPLOYER'S AFFIRMATIVE
DEFENSE DATED OCTOBER 30, 1972

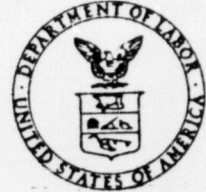
U. S. DEPARTMENT OF LABOR
Office of the Solicitor

1515 BROADWAY

Tel. 212-971-7571

NEW YORK, NEW YORK 10036

October 30, 1972



Mr. Allen H. Sachsel
Acting Executive Secretary
Occupational Safety & Health
Review Commission
1825 K Street, North West
Washington, D.C. 20006

Dear Mr. Sachsel:

Re: Underhill Construction Corp.
OSHRC Docket No. 1307

The Secretary of Labor by the undersigned, respectfully
moves the Occupational Safety and Health Review Commission
for an order striking respondent's affirmative defense.

A brief in support of this motion is attached.

Sincerely,

A handwritten signature in dark ink, appearing to read "Francis V. LaRuffa".
Francis V. LaRuffa
Regional Solicitor

Attachment

cc: Mr. W. J. Pastore ✓
Local 14 & 15 International Union of Operating Engineers
Local 46, Metallic Letters Union
Local 20, 6A & 18A, Cement and Concrete Workers Union
Local 780 United Cement Masons Union of Greater New York
Local 257, Carpenter's Local Union

ADMINISTRATIVE LAW JUDGE'S RULING ON SECRETARY'S
MOTION TO STRIKE EMPLOYER'S AFFIRMATIVE
DEFENSE DATED NOVEMBER 16, 1972

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1625 K STREET, NW
WASHINGTON, DC 20005

IN REFERENCE TO

16 NOV 1972

CASE
NAME

Secretary of Labor v. Underhill Construction Corporation

OSHRC

BUCKET NO.

1307

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa
Regional Solicitor
1515 Broadway, Room 3555
New York, New York 10036

FOR EMPLOYER

Mr. William J. Pastore
Norton, Sacks, Molineaus & Pastore
230 Park Avenue
New York, New York 10017

FOR EMPLOYEES

International Union of Operating Engineers
Local Numbers 14 and 15
336 East 15th Street
New York, New York

Metallic Lathers Union
Local No. 46
1332 Third Avenue
New York, New York

Cement and Concrete Workers Union
Local No. 20
207 East 84th Street
New York, New York

Cement and Concrete Workers Union
Local No. 6A
10 East 15th Street
New York, New York

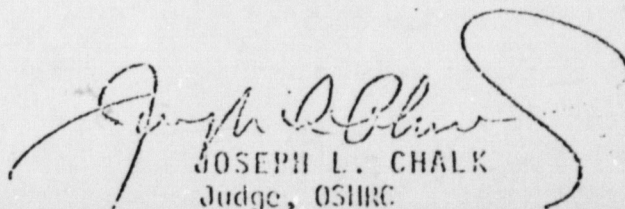
OF Ruling on Complainant's motion
to strike Respondent's affirmative
defense.

To wit: Motion denied without prejudice
to renew upon proof that the contract,
if advertised, was advertised on or
after April 24, 1971, or if negotiated,
that negotiations commenced on or
after April 27, 1971. In this respect,
it is noted that the copy of the
contract submitted by Respondent
indicates conflicting dates on the
first and last pages thereof.

Cement and Concrete Workers
Union
Local No. 18A
321 East 73rd Street
New York, New York

United Cement Masons Union of
Greater New York and Long Island
Local No. 780
178 East 85th Street
New York, New York

Carpenter's Local Union
Local No. 257
157 East 25th Street
New York, New York


JOSEPH L. CHALK
Judge, OSHRC

ADMINISTRATIVE LAW JUDGE'S ACTION ON MOTION
DATED DECEMBER 4, 1972

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1025 K STREET, N.W.
WASHINGTON, DC 20006

IN REFERENCE TO

December 4, 1972

CASE NAME Secretary of Labor v. Underhill Construction Company

OSIHC
DOCKET NO. 1307

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF Action on motion.

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa
Regional Solicitor
1515 Broadway, Room 3555
New York, New York 10036

To wit: Complainant's motion dated
November 29, 1972, to strike
Respondent's affirmative defense
is denied without prejudice.

FOR EMPLOYER

William J. Pastore, Esquire
Norton, Sacks, Molineaus & Pastore
230 Park Avenue
New York, New York 10017

FOR EMPLOYEES

International Union of Operating
Engineers
Local Numbers 14 and 15
336 East Street
New York, New York

Cement & Concrete Workers Union
Local No. 18A
321 East 73rd Street
New York, New York

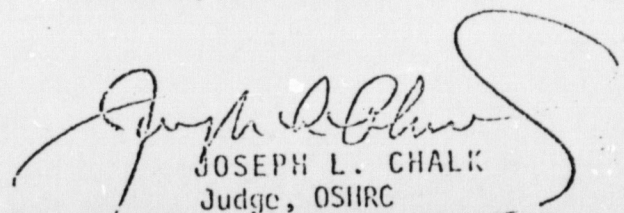
Metallic Lathers Union
Local No. 46
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New York, New York

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Greater New York and Long Island
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178 East 85th Street
New York, New York

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207 East 84th Street
New York, New York

Carpenter's Local Union
Local No. 257
157 East 25th Street
New York, New York

Cement and Concrete Workers Union
Local No. 6A
10 East 15th Street
New York, New York


JOSEPH L. CHALK
Judge, OSIHC

ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER
DATED MAY 23, 1973

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

-----	:	
Secretary of Labor	:	
Complainant	:	
v.	:	DOCKET NO. 1307
Underhill Construction Corporation	:	
Respondent	:	
-----	:	

APPEARANCES

Robert N. Nelson, Esq.
For Complainant

William J. Pastore, Esq.
For Respondent

DECISION AND ORDER

Chalk, Judge

A Citation for Serious Violation was issued on July 18, 1972 against Respondent as a result of an inspection, on June 14 and 15, 1972, of its worksite - the Waterside Apartments - located at 25th Street and F.D.R. Drive, in New York, New York. Therein, Respondent was charged with violating Section 5(a)(2) of the Occupational Safety and Health Act of 1970 by not guarding an open-sided floor on the twentieth floor of Building C with a standard railing, as required by 29 CFR 1926.500(d)(1). A penalty of \$700.00 was proposed for this alleged violation on the same date. Respondent contested this Citation and proposed penalty on August 8, 1972.

Administrative Law Judge's Decision and Order
Dated May 23, 1973

Although not officially a part of this record, because of Respondent's failure to contest same, a Citation for four alleged nonserious violations of the same section of the Act for not complying with 29 CFR 1926.300(b)(2), 29 CFR 1926.28(a), 29 CFR 1926.450(a)(10), and 29 CFR 1926.250(a)(3), respectively, was issued at the same time and as a result of the same inspection. Penalties totaling \$175.00 were proposed for three of these four charges.

The evidence adduced at the hearing in New York, New York, on January 10, 1973, on the merits of this case need not be summarized because I have concluded that Respondent was not, as a matter of law, subject to the construction standards and hence not subject to the jurisdiction of this Commission. I reach this conclusion because of a provision in the construction standards that exempts employers where negotiations on the contract covering their activities in question began prior to April 28, 1971.

A rather unique procedure was employed by the Secretary of Labor in promulgating safety and health standards for the construction industry under the Safety and Health Act that has, in my view, led to confusion and promoted conflicting opinions by several judges of this Commission on the very problem raised by the facts in this case (see Secretary of Labor v. Kesler and Sons Construction Company, Docket Number 306, December 29, 1972 (presently under review by the Commission), Secretary of Labor v. Universal Sheet Metal Corporation, Docket Number 657, February 5, 1973 (presently under review by the Commission), and Secretary of Labor v. Deisel Construction Company, Docket Number 827, January 15, 1973 (not ordered for review by the Commission)).

Administrative Law Judge's Decision and Order
Dated May 23, 1973

Specifically, the safety and health standards in question were initially promulgated, on April 17, 1971, and later reissued, on December 16, 1972, under an entirely different Act (Contract Work Hours and Safety Act, 86 Stat. 96, 40 U.S.C. 327, commonly known as the Construction Safety Act), unrelated to the Act under which we function, and were adopted for or incorporated into the latter Act by 29 CFR 1910.12, effective April 28, 1971, the date the latter Act itself became effective. Moreover, whereas these standards under the Construction Safety Act relate only to Federal and federally assisted construction contracts, 29 CFR 1910.12 provides no such limitation with respect to the Safety and Health Act. Rather, it directs their applicability under the Safety and Health Act to "every employment and place of employment of every employee engaged in construction work." It is important to note, too, that while 29 CFR 1910.12 specifically excludes the first two subparts, A and B, of the adopted standards, for the stated reason that they "have pertinence" only to "the Construction Safety Act," no other exclusions are mentioned. The effect of this exclusion factor vis-a-vis the non-exclusion factor must be considered highly significant (*Posados v. National City Bank of New York*, 296 US 497, 56 S. Ct. 349 (1936); *Jones v. Alfred H. Mayer Company*, 392 US 409, 88A S. Ct. 2186 (1968)).

The standards in question presently appear in the 29 CFR 1926 series, whereas the previous edition appeared in the 29 CFR 1518 series (in effect at the time of the inspection in question). ^{1/} In Subpart X, paragraph

^{1/} Variations in language and format between the two series serve to add to the confusion. Also, the same problem is encountered between the original and revised edition of the 29 CFR 1910 series.

Administrative Law Judge's Decision and Order
Dated May 23, 1973

1050 of each, there appears the following:

"Except where different effective dates are specifically provided in [§§1926.1051 and 1518.1051, respectively] the safety and health standards published in Subpart C through U of this part shall become effective on April 24, 1971, for all Federal and federally assisted advertised contracts subject thereto which are advertised after that date and on April 27, 1971, for all such negotiated contracts for which negotiations begin after that date."

In explanation of this provision, the preamble to the initial series, 29 CFR 1518, explained that the standards applied "only to new construction contracts" (Emphasis added), and that the purpose of the provision was to "afford affected persons reasonable time to take such action as may be necessary to comply with the [standards]."

Clearly, these standards are not applicable to contracts under the Construction Safety Act where the advertising occurred or negotiations began prior to the respective applicable dates set forth in 29 CFR 1926.1050 (formerly 29 CFR 1518.1050). In light of the fact this paragraph was not excluded by the adopting regulation, 29 CFR 1910.12, I have concluded that it must be applied to the Safety and Health Act (*Posados v. National City Bank of New York*, supra; *Jones v. Alfred H. Mayer Company*, supra). This conclusion also accords with the usual rule of statutory construction that clear and unambiguous language found in a statute shall be given its ordinary meaning, rather than be distorted so as to defeat the intent and purpose of the enacting body (*United States v. Rice*, 327 US 742, 66 S. Ct. 835 (1946); *United States v. State of California*, 297 US 175, 56 S. Ct. 421 (1936); *Rucker v. Wabash Railroad Company*, 417 F2d 146 (7th Cir., 1969)). Although perhaps not decisive, such conclusion

*Administrative Law Judge's Decision and Order
Dated May 23, 1973*

also preserves the integrity of the contractual relationships involved, and promotes an atmosphere of fairness in dealing alike with two Acts of Congress that have a common objective.

This record clearly shows, and the Secretary candidly admits, that negotiations on the contract covering Respondent's activities at the time and place in question began, at the very least, as early as the year 1969 (Tr. 94-98; Ex. R-4; Complainant's brief, pp 2-3). In fact, Respondent's vice-president testified that Respondent was first involved in the project during the year 1968 (Tr. 94). These unrefuted facts, therefore, lead inevitably to the conclusion that Respondent's operation at the jobsite in question was not subject to the provisions of the Act. Consequently, the contested Citation and Notification of Proposed Penalty were void as a matter of law and must be vacated.

The same reasoning and result applies to the uncontested Citation for nonserious violations and the proposed penalties therefor, notwithstanding the Act's proviso that an uncontested Citation and Notification of Proposed Penalty ripen into a final order of the Commission not subject to review after the passage of fifteen working days (Sec. 10(a)). Such finality clause becomes operative only where the Secretary's enforcement action was lawful in the first instance (see generally 49 CJS 449). It is my duty to take cognizance of this want of jurisdiction and to correct the record by vacating the Secretary's Citation and proposed penalties.

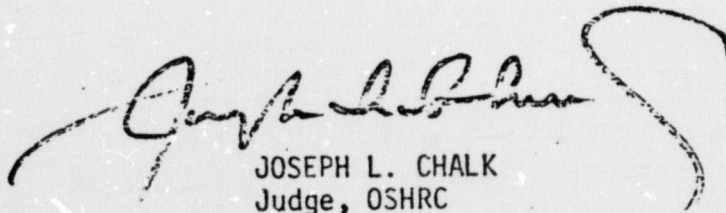
In urging the contrary conclusion I reach here, the Secretary advances much the same argument he made in Kesler and Sons Construction Company, Universal Sheet Metal Corporation, and Deisel Construction Corporation, supra.

Administrative Law Judge's Decision and Order
Dated May 23, 1973

I choose not to belabor that argument here, as it has been fully set forth in those decisions. 2/ Suffice it to note that I agree with Judge Worcester's views and the result he reached in Universal Sheet Metal Corporation.

The Citation for Serious Violation, the Citation (nonserious violations), and the Notification of Proposed Penalties pertaining to both are vacated. Any penalties paid by Respondent to the Secretary will be refunded.

It is so ORDERED.



JOSEPH L. CHALK
Judge, OSHRC

Dated MAY 23 1973
Washington, D. C.

2/ In all honesty, I must confess my inability to follow the argument with any appreciable degree of comprehension.

SECRETARY'S PETITION FOR DISCRETIONARY REVIEW
DATED JUNE 14, 1973

U. S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington, D. C. 20210

June 14, 1973

Mr. William S. McLaughlin
Executive Secretary
Occupational Safety and Health
Review
1825 K Street, N. W.
Washington, D. C. 20006

Re: Secretary of Labor v. Underhill Construction Corp.
OSHRC Docket No. 1307

Dear Mr. McLaughlin:

Enclosed herewith are the original and four copies of the Secretary's Petition for Discretionary Review in the above-styled case.

Also, please enter my appearance as additional counsel for the Secretary.

Sincerely,

F. A. Housh, Jr.
Counsel for Regional Litigation

Enclosures

cc: William J. Pastore, Esquire
Norton, Sacks, Molineras & Pastore
230 Park Avenue
New York, New York 10017

Francis V. LaRuffa
Regional Solicitor

Secretary's Petition for Discretionary Review
Dated June 14, 1973

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, PETER J. BRENNAN	:	
	:	
Complainant	:	
	:	
v.	:	OSHRC DOCKET NO. 1307
	:	
UNDERHILL CONSTRUCTION CORPORATION	:	
	:	
Respondent	:	

PETITION FOR DISCRETIONARY REVIEW

Now comes Complainant, the Secretary of Labor, and petitions the Occupational Safety and Health Review Commission [Commission] to review the decision of Commission Judge Joseph L. Chalk, which decision was received at the Commission on May 23, 1973. Judge Chalk held that Respondent herein was, as a matter of law, not subject to the jurisdiction of the Commission.

In reaching the above conclusion, Judge Chalk found that a provision in the construction standards, 29 C.F.R. 1926.1050 [at the time of this case 29 C.F.R. 1518.1050] exempted employers where negotiations on the contract covering their activities in question began prior to April 28, 1971.

As grounds therefor, Complainant states the following:

1. 29 C.F.R. 1910.12 adopted only the substantive provisions of the Contract Work Hours and Safety Standards Act

Secretary's Petition for Discretionary Review
Dated June 14, 1973

(Construction Safety Act) and not the provisions restricting its applicability.

2. 29 C.F.R. 1910.12 states that the adopted construction standards "shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work" (Emphasis added).

3. Subpart (c) of 1910.12 emphasizes that the substantive standards published in Part 1926 (formerly 1518) under the Act establish duties for employers which are not dependent for their application upon any contractual relationship with the Federal Government or upon any form of Federal financial assistance.

4. 29 C.F.R. 1910.11 describes the scope and purpose of 1910.12 as adoption and extension of the applicability of established Federal standards in effect on April 28, 1971. Adoption of the construction standards was intended not to carry with it the limitation of applicability respecting advertised Federal and federal'y assisted contracts.

Respectfully submitted.

William J. Kilberg
Solicitor of Labor

Benjamin W. Mintz
Benjamin W. Mintz, Associate
Solicitor for Occupational
Safety and Health

T. A. Housh, Jr.
T. A. Housh, Jr., Counsel
for Regional Litigation

Michael Robilotto
Michael Robilotto, Attorney

COMMISSIONER VAN NAMEE'S DIRECTION FOR REVIEW
DATED JUNE 19, 1973

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant

v.

UNDERHILL CONSTRUCTION CORPORATION,

Respondent

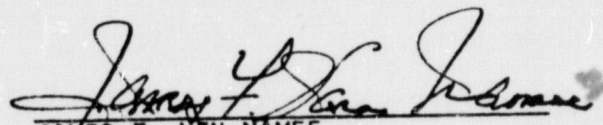
OSHRC DOCKET NO. 1307

DIRECTION FOR REVIEW

Pursuant to the authority granted by the provisions of Section 12(j) of the Occupational Safety and Health Act of 1970, the undersigned hereby directs review of the proposed decision and order in the above-captioned case.

Submissions are requested on but not limited to the following question:

Whether the Judge's conclusion that the Commission lacks jurisdiction to consider alleged violations of standards published at 29 C.F.R. 1926.28(a), 1926.250(a)(3), 1926.300(b)(2), 1926.450(a)(10), and 1926.500(d)(1), was in error.


JAMES F. VAN NAMEE
COMMISSIONER

DATE: June 19, 1973

COMMISSION'S DECISION DATED JANUARY 31, 1975

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant

v.

UNDERHILL CONSTRUCTION CORPORATION,

Respondent

OSHRC DOCKET NO. 1307

DECISION

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

VAN NAMEE, Commissioner:

This matter is before us on Judge Joseph L. Chalk's determination to vacate both a contested citation for an alleged serious violation of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq., hereinafter "OSHA") and an uncontested citation alleging four non-serious violations. He concluded that both citations were void as a matter of law in view of the effective date provisions of 29 C.F.R. 1926.1050 because Respondent's contract for construction was negotiated prior to April, 1971^{1/}. He did not reach the merits of

1/ The hearing judge also said we were without jurisdiction. Manifestly, if we were without jurisdiction, then the judge was without authority to act on the citations. In this regard his statement was correct as to the non-serious matter because it had not been timely contested (29 U.S.C. 659(a)). The citation was and is final by operation of law. Accordingly, the judge's decision in that regard is of no effect and need not be further dealt with.

the case.

Section 1926.1050 is in Subpart X of the Construction Safety Standards and was promulgated by Complainant on April 17, 1971,^{2/} pursuant to the authority granted to him by section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 et seq., hereinafter the "Construction Safety Act" or "CSA"). It provides as follows:

Except where different effective dates are specifically provided in [§1926.1051] the safety and health standards published in Subparts C through U of this part shall become effective on April 24, 1971, for all Federal and federally assisted advertised contracts subject thereto which are advertised after that date and on April 27, 1971, for all such negotiated contracts for which negotiations begin after that date.

On May 29, 1971, Complainant promulgated 29 C.F.R. Part 1910 pursuant to the authority granted by section 6(a) of OSHA. Subpart B thereof adopts and extends "established Federal standards in effect on April 28, 1971, with respect to every employer, employee, and employment covered by the Act" (29 C.F.R. 1910.11). And section 1910.12 of subpart B stated, in part:

The standards prescribed by Part 1518 [now 1926] of this title and in effect on April 28, 1971 are adopted as occupational safety or health standards under section 6(a) of the Act and shall apply, according to the provisions thereof to every employment and place of employment of every employee engaged in construction work. (36 F.R. 10,469).

Thereafter, section 1910.12 was amended by adding paragraph c which in pertinent part is as follows:

(c) Construction Safety Act distinguished.

^{2/} 36 Fed. Reg. 7340.

Commission's Decision Dated January 31, 1975

This section adopts as occupational safety and health standards under section 6 of the Act the standards which are prescribed in Part 1926 of this chapter. Thus, the standards (substantive rules) published in Subpart C and the following subparts of Part 1926 of this chapter are applied. This section does not incorporate Subparts A and B of Part 1926 of this chapter. Subparts A and B have pertinence only to the application of section 107 of the ...Construction Safety Act.

In view of the provisions of section 1910.12 and because they specifically exclude Subparts A and B of Part 1926, Respondent (herein after "Underhill") herein argues that the effective date provisions of Subpart X, quoted above, are applicable under OSHA so as to exclude construction employments and places of employment from compliance with the provisions of Part 1926 where negotiations on the contracts therefor were commenced prior to April 27, 1971.^{3/} In addition, Underhill points to the preamble to Part 1926 and particularly that portion which refers to new construction as support for its argument.^{4/} As noted, Judge Chalk adopted Underhill's position. We reverse.

3/ This very argument was rejected by our hearing judges in Kesler & Sons Construction Co., No. 306 (1972), rev'd on other grounds, BNA 2 O.S.H.C. 1096, CCH E.S.H.G. para. 18,165 (Rev. Com'n., 1974); Diesel Construction Co., No. 827 (1973) and by one district court, United States v. J. M. Rosa Construction Co., Inc., unofficially reported BNA 1 O.S.H.C. 1188 (D. Conn. 1973). Judge Worcester, like Judge Chalk herein, held to the contrary in Universal Sheet Metal Corp., No. 657 (1973), aff'd on other grounds, BNA 2 O.S.H.C. 1061, CCH E.S.H.G. para. 18,163 (Rev. Com'n., 1974).

4/ This additional argument is unmeritorious. The preamble to Part 1926 has to do with the promulgation of construction safety and health standards under the Construction Safety Act. We are concerned with their promulgation and application under a different law, i.e., OSHA.

Underhill's argument must fail because it ignores the fact that only "established Federal standards" are adopted and promulgated by Subpart B of Part 1910. The term "established Federal standard" is a term of art and is defined in section 3(10) of OSHA as meaning "any operative occupational safety and health standard established and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act." Likewise, the term "occupational safety and health standard" is a term of art. It is defined by section 3(8) as meaning "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

Clearly, by its own terms, section 1926.1050 is not an "occupational safety and health standard." It does not require affirmative action to provide safe and healthful employments and places of employment. On the contrary it operates as an exception. And were we to adopt Underhill's position the result would be the opposite of that required by an "occupational safety and health standard." Since by the terms of section 1910.11 and 1910.12 Complainant only promulgated standards under OSHA and since we conclude that section 1926.1050 is not a standard we find that Underhill was required to conform its practices to the requirements of the construction safety and health standards.

The Merits

As noted above, Judge Chalk did not reach the merits of this controversy. We have reviewed the record and find it appropriate

to decide the case rather than remand it. It arose on the following facts. Underhill, a concrete subcontractor, was engaged in the construction of a major apartment complex in New York City. On June 14, 15, 1972 Complainant inspected Underhill's worksite. Underhill's employees were stripping concrete forms and placing rebar near the outside perimeters of the 18th, 19th and 20th floors of building C. The perimeters were not guarded as required by 29 C.F.R. 1926.500(d)(1) nor were employees protected against falls by other means. On these facts Complainant issued a citation alleging a serious violation of the aforementioned standard. A civil penalty of \$700 was proposed.

As to the merits Underhill conceded that its employees were exposed to the hazard. It defended on the basis that it was the custom in New York City that only floors below those being stripped and formed be provided with perimeter protection. It was also argued that perimeter protection would render the stripping operation practically impossible.^{5/}

As to Underhill's first argument it is enough to say that local customs must give way to the Federal law. See 29 U.S.C. 667(a).

As to the second argument, Underhill says that perimeter guards would interfere with a stripping operation. It was also said that some guards would have to be dismantled to allow the conveyance of materials

^{5/} Underhill argued further that 29 C.F.R. 1926.700(b)(1) which requires that employees engaged in tying and placing reinforcing steel be provided with safety belts applies rather than 1926.500(d)(1). That may be as to such employees but clearly it does not apply to the stripping operations and the facts are uncontroverted that Underhill's exposed employees were engaged in stripping forms.

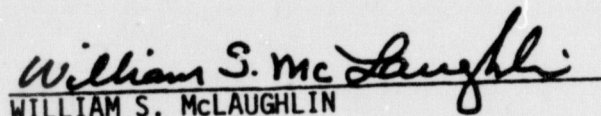
Commission's Decision Dated January 31, 1975

to upper floors. It is significant that Underhill failed to argue that guards could not be installed. Accordingly, we view its arguments as being directed towards inconvenience rather than impossibility and we reject them. In view of the uncontroverted facts we conclude that Underhill committed a serious violation of 29 C.F.R. 1926.500(d)(1) and of section 5(a)(2) of OSHA.

Turning now to the matter of an appropriate penalty we note that a fall from any of the unguarded levels involved herein would almost certainly result in death. The gravity was very high. In addition, Underhill performs concrete construction on the largest building projects in the country and must therefore be considered large in size. On the other hand, it has no history of record of prior violations, and we are given no reason to question its good faith. In the circumstances, the proposed penalty is appropriate.

Accordingly, the judge's decision is reversed, Underhill is found in serious violation of 29 C.F.R. 1926.500(d)(1) and of 29 U.S.C. 654(a), and a civil penalty of \$700 is assessed therefor. It is so ORDERED.

FOR THE COMMISSION:


WILLIAM S. McLAUGHLIN
EXECUTIVE SECRETARY

DATE: JAN 31 1975

CLEARY, Commissioner, Concurring:

I concur in Commissioner Van Namee's disposition of this case. The precedent cited in footnote 3 of his opinion is fully dispositive of respondent's arguments concerning the application of the construction safety standards. I agree fully with his decision on the merits.

MORAN, Chairman, Dissenting:

Judge Chalk correctly decided this case, and his decision should be affirmed. Moreover, contrary to the assertion in footnote 1 of the lead opinion, that decision does not state that the Commission lacked jurisdiction to consider the validity of the citations involved in this case. Quite the opposite, the Judge properly recognized and asserted his authority to invalidate citations where there was no subject matter jurisdiction under the Occupational Safety and Health Act of 1970.

Furthermore, the finality provision in 29 U.S.C. § 659(a) does not preclude the Commission from acting on a citation where there is a jurisdictional defect therein.^{6/} Jurisdictional issues can and should be addressed by the Commission at any time and even on its own motion if

^{6/}We so recognized in one of our earliest decisions.
Secretary v. Phoenix, Inc., 1 OSAHRC 355 (1972).

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necessary. ^{7/} See Clark v. Paul Gray, Inc., 306 U.S. 583, 588 (1939); Hackner v. Guaranty Trust Company of New York, 117 F.2d 95 (2d Cir., 1941); Fed. R. Civ. P. 12(h)(3). Of course, it is hornbook law that a judicial tribunal can assert jurisdiction for the purpose of determining whether it has jurisdiction over a matter in issue. ^{8/} See United States v. United Mine Workers of America, 330 U.S. 258, 290 (1947); Moore v. Dalessio, 332 F. Supp. 926 (D. Mass. 1971).

The initial source of the problem in this case is 29 C.F.R. Part 1518 ^{9/} which was published in the Federal Register on April 17, 1971. 36 Fed. Reg. 7340-7410 (1971). The construction regulations published therein were promulgated under the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333, as standards applicable to contractors performing Federal and federally assisted contracts.

^{7/}United States v. J. M. Rosa Construction Co., No. B-637 (D. Conn., April 2, 1973), cited in footnote 3 of the lead opinion, belies any contention to the contrary. Although the citations became final orders under 29 U.S.C. § 659(a) in that case, the Court addressed the same jurisdictional issue that is before us in this case, while refusing to consider other challenges to the citations on their merits.

^{8/}Quaere: Since the Commission has not taken action to reverse the Judge's determination on the citation for nonserious violations, doesn't the Judge's decision thereon continue to stand?

^{9/}Part 1518 was redesignated as Part 1926 on December 30, 1971. 36 Fed. Reg. 25232 (1971). Thereafter, Part 1926 was republished on December 16, 1972, allegedly without substantive change. 37 Fed. Reg. 27503 (1972). The violations in this case are alleged to have occurred in June of 1972.

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With certain exceptions which are not pertinent in this case, those standards became "effective on April 24, 1971, for all Federal and Federally assisted advertised contracts . . . which [were] advertised after that date and on April 27, 1971, for all such negotiated contracts for which negotiations [began] after that date." 29 C.F.R. § 1518.1050, 36 Fed. Reg. 7410(1971). But, what about Federal and federally assisted contracts that were advertised or under negotiation before those dates? The only logical answer is that they were exempted. This is made clear in the preamble to Part 1518^{10/} which provides the following:

"The rules are applied to new construction contracts which are advertised on or after the seventh day following publication of this document in the Federal Register. In the case of negotiated construction contracts, the rules shall be effective as to new contracts of this nature for which negotiations are commenced on or after 10 days following publication in the Federal Register." (Emphasis added.)

36 Fed. Reg. 7340 (1971).

^{10/}In United States v. J. M. Rosa Construction Co., supra note 7, it was held that 29 C.F.R. § 1518.1050 "advances the effective date of [the standards] for federal and federally assisted contracts in certain cases" rather than "providing an exemption to the standards." That decision did not, however, consider the preamble to Part 1518 or whether there was good reason for providing an exemption. Additionally, in treating section 1518.1050 as providing an exception to the effective date of August 27, 1971, the date when the scope of the applicability of the construction standards was extended by 29 C.F.R. § 1910.(a)(1) to cover all construction (36 Fed. Reg. 10469 (1971)), that decision does not seem to recognize that section 1910.12(a)(1) was published on May 29, 1971, more than a month after section 1518.1050, and that the construction safety standards could not be made applicable to the entire industry before April 28, 1971, the effective date of the Act. In my opinion, it is unlikely that an exception would come before the general rule.

The opinions of my colleagues leave some doubt as to what they are holding. They could be holding that no construction project is exempt from compliance with the construction safety standards after August 26, 1971, regardless of the type of contract and the advertisement and negotiation dates thereof. Also, they could be holding only that there is no exemption where the contract is not a Federal or federally assisted contract. Whichever it might be, I disagree.

The evidence indicated that the contract here in question was being negotiated as early as the year 1969 but, since it also tends to show that the contract was not negotiated as a Federal or federally assisted contract, it is unlikely that the Commission is holding that the original exemption was subsequently repealed by Part 1910. The obvious injustice of such a repeal is self-evident. Furthermore, there is nothing in subsequent regulations that indicates that a repeal of the exemption for Federal and federally assisted contracts was intended. To the contrary, the fact that 29 C.F.R. § 1926.1050 was republished with language identical to that in 29 C.F.R. § 1518.1050 shows that a repeal was not intended.

If the discussion of various regulations in this decision does not create utter confusion, then consideration of other cases dealing with the instant issue ^{11/} is bound to achieve that result. Rather than utilizing legal mumbo jumbo to resolve the breadth of the exemption, it is best to consider the reason for the initial exemption.

11/ See the cases cited in note 3 supra.

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The reason for the exemption is found in the preamble to Part 1518, where the Secretary of Labor explains the delayed effective dates as follows:

"The time lag in the procurement process, together with the time periods specified, are considered sufficient to afford affected persons reasonable time to take such action as may be necessary to comply with the rules."

36 Fed. Reg. 7340 (1971). As Judge Worcester so succinctly observed in interpreting this sentence in Secretary v. Universal Sheet Metal Corp., 9 OSAHRC 742, 750 (1974):

"It is obvious that the Secretary was not unmindful of the fact that when the standards and the Act became effective in April 1971 there would be certain employers in the construction industry who had no way of knowing when they bid on a project that they would be required to bear the expense of furnishing protection in compliance with safety rules which did not exist at the time the bid was made. It would be a patent violation of the rights of the Respondent if it were charged with a violation of a standard or standards which did not exist when the Respondent agreed, for a consideration, to perform the construction work"

The reason for excluding previously advertised and negotiated contracts is the same now as it was in April of 1971. Also, there is no valid reason for distinguishing Federal and federally assisted contracts from other contracts in applying the exclusion. No contractor, irrespective of the type of contract involved, could reasonably be expected to anticipate in his bidding before the dates specified in 29 C.F.R. § 1518.1050 the added costs which he would incur when required to comply with the new construction safety regulations. Within a reasonable time after the publication of Part 1518, it was logical for contractors who were

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seeking to enter other than Federal or federally assisted contracts to expect that the standards in Part 1518 would soon be made applicable to them in accordance with 29 U.S.C. § 655(a).^{12/} Similarly, it was reasonable for such contractors to assume that at the very least the section 1518.1050 exclusionary dates would apply to them.

Finally, I believe that the convoluted ambiguousness of the regulations, if nothing else, requires that any doubt in this case be decided in the respondent's favor. See United States v. Bass, 404 U.S. 336, 347-348 (1971).

^{12/}With various provisos which are not pertinent here, 29 U.S.C. § 655(a) required the Secretary to "promulgate as an occupational safety or health standard . . . any established Federal standard."

UNITED STATES COURT OF APPEALS
~~FOR THE SECOND CIRCUIT~~

UNDERHILL CONSTRUCTION CORPORATION,

Petitioner,

against

SECRETARY OF LABOR AND OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes
and says that he is over the age of 18 years. That on the 11th
day of June, 1975, he served one copies of the
Petitioner's Appendix on
Michael H. Levin, Esq. Counsel for Appellate Litig-
ation and on William S. McLaughlin, Executive Secre-
tary, OSHRC
the attorney s for the Respondents
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney s at
No. U.S. Dept. of Labor, Rm. S4004, () N. Y.,
200 Constitution Ave. N.W. and 1825 K St., N.W. Wash. D.C.
that being the address designated by t h e m for that purpose upon
the preceding papers in this action.

Irving Lightman

Sworn to before me this

11th day of June, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976